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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Robert Dale Higgins,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
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No. CV-13-0189-TUC-DTF

ORDER

15 Petitioner Robert Higgins, presently incarcerated at the Arizona State Prison-
16 Eyman, Meadows Unit, in Florence, Arizona, has filed a Petition for Writ of Habeas
17 Corpus pursuant to 28 U.S.C. § 2254. Before the Court are the Petition (Doc. 1),
18 Respondents' Answer (Docs. 22-25), and Petitioner's Reply (Doc. 29). The parties have
19 consented to Magistrate Judge jurisdiction. (Doc. 20.) Based on the pleadings and
20 exhibits submitted to the Court, the Petition is denied.
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23 **FACTUAL AND PROCEDURAL BACKGROUND**

24 Higgins was convicted in the Superior Court of Cochise County of child
25 molestation, indecent exposure, tampering with evidence, and 16 counts of sexual
26 exploitation of a minor. (Doc. 22, Ex. B.) On October 22, 2009, he was sentenced to
27 prison terms totaling 227 years. (*Id.*)
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1 The convictions were based on the following facts, as summarized by the appellate
2 court:
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4 While using Higgins's desktop computer in October 2007, his girlfriend B.
5 found and viewed a portion of a recently recorded video depicting Higgins
6 and his then-four-year-old daughter, T. In the video, Higgins was naked,
7 while T. was wearing only a t-shirt. Higgins, while masturbating,
8 approached T. and appeared to speak to her, at which time she "went on all
9 fours" and turned her "buttocks . . . towards him." Higgins then reached his
10 hand toward her genitals and, according to B., "it looked like he had
11 actually touched her genital area," although B. also stated she "didn't
12 actually see" Higgins "touch [T.'s] area" because T.'s "leg was in the way"
13 and B. therefore could not see his hand. B. stopped the video before it
14 ended and called Higgins, threatening to contact law enforcement. Higgins
15 then returned to his house, and when B. asked him "if he had done it," he
16 responded that he wanted to "explain." B. then left, telling Higgins that she
17 was going to report him.

18 After B. spoke with police officers, she agreed to make a recorded
19 telephone call to Higgins. During that call, Higgins tacitly admitted he had
20 touched T. inappropriately but explained he had only done it once and it
21 had been a mistake. Pursuant to a search warrant, police officers searched
22 Higgins's home and, although they did not find his desktop computer, they
23 found a laptop computer. A computer forensics expert discovered on the
24 laptop computer's hard drive ten photographs and four videos depicting
25 child pornography, all involving unknown victims. Police officers later
26 found Higgins at a hotel and arrested him. Officers found Higgins's desktop
27 computer in his hotel room, but the hard drive had been removed and
28 thrown away and Higgins had installed a replacement.

(Doc. 22, Ex. E at 2-3.)

29 Higgins filed an appeal, and the Arizona Court of Appeals affirmed his
30 convictions and sentences. (Doc. 22, Exs. D, E.) Higgins did not seek review in the
31 Arizona Supreme Court. (*Id.*, Ex. G.) Higgins filed a Notice of Post-conviction Relief
32 (PCR). (*Id.*, Ex. H.) Higgins's appointed attorney filed an *Anders* brief, stating that he did
33 not find any claims for relief to raise in a PCR petition and seeking leave for Higgins to

1 file a pro se petition if he so chose. (*Id.*, Ex. J.) Petitioner filed a PCR petition, which was
2 denied. (*Id.*, Exs. K, L.) Higgins sought and was granted review of the PCR denial in the
3 Arizona Court of Appeals, but relief was denied. (*Id.*, Exs. M, N.) Higgins did not seek
4 review in the Arizona Supreme Court. (*Id.*, Ex. O.)

5 6 7 **DISCUSSION**

8 Petitioner raises nine claims in his Petition. Respondent does not contest the
9 timeliness of the Petition but contends Claims 1 and 6 are procedurally defaulted and
10 Claim 9 is not cognizable. The Court will first exam exhaustion of Claims 1 and 6 and
11 then address the merits of the remaining claims, including the cognizability of Claim 9.

12 13 **PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT**

14 A writ of habeas corpus may not be granted unless it appears that a petitioner has
15 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
16 *Thompson*, 501 U.S. 722, 731 (1991). To properly exhaust, a petitioner must “fairly
17 present” the operative facts and the federal legal theory of his claims to the state’s highest
18 court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848
19 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-
20 78 (1971).

21 In Arizona, there are two primary procedurally appropriate avenues for petitioners
22 to exhaust federal constitutional claims: direct appeal and PCR proceedings. A habeas
23 petitioner’s claims may be precluded from federal review in two ways. First, a claim may
24 be procedurally defaulted in federal court if it was actually raised in state court but found
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1 by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30.
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3 Second, a claim may be procedurally defaulted if the petitioner failed to present it in state
4 court and “the court to which the petitioner would be required to present his claims in
5 order to meet the exhaustion requirement would now find the claims procedurally
6 barred.” *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th
7 Cir. 1998) (stating that the district court must consider whether the claim could be
8 pursued by any presently available state remedy). If no remedies are currently available
9 pursuant to Rule 32, the claim is “technically” exhausted but procedurally defaulted.
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11 *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray*, 518 U.S. at 161-62.
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13 Because the doctrine of procedural default is based on comity, not jurisdiction,
14 federal courts retain the power to consider the merits of procedurally defaulted claims.
15 *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a
16 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the
17 failure to properly exhaust the claim in state court and prejudice from the alleged
18 constitutional violation, or shows that a fundamental miscarriage of justice would result if
19 the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.
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22 ANALYSIS OF PROCEDURAL DEFAULT

23 In Claims 1 and 6, Higgins alleges trial and appellate counsel were ineffective for
24 failing to contest the exercise of jurisdiction over the counts in the indictment based on
25 the images found on his laptop computer. Specifically, Higgins argues that receipt of the
26 images occurred in South Korea in 2005 and the images were never accessed or even
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1 accessible in Arizona because the laptop was broken. Respondents concede Higgins fairly
2 presented these claims in state court (Doc. 22, Ex. K at 5-7, 16-17), but contend they
3 were found precluded on state law grounds.
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5 In the PCR petition, regarding trial counsel, Higgins argued that there was no
6 jurisdiction because the images at issue were downloaded outside of Arizona and never
7 accessed within the state. (Doc. 22, Ex. K at 6.) He went on to assert that trial counsel
8 failed to argue that he did not possess the images within the jurisdictional boundaries of
9 Arizona because the computer was broken and the images were only accessible with
10 specialized software. (*Id.* at 7.) Higgins argued that the central question was one of
11 possession, without which there was no jurisdiction, (*Id.* at 8.) In a later section, Higgins
12 argued that appellate counsel failed to contest jurisdiction and conceded that Higgins
13 possessed the images, despite the last access to the images occurring outside the
14 jurisdictional boundary of Arizona. (*Id.* at 16.)
15

16 The PCR court held that trial counsel did not fall below professional norms
17 because “[i]t was clear that Arizona did have jurisdiction to prosecute defendant for
18 possession of the images . . . and thus any supposed failure of trial counsel in contesting
19 these issues would not have prejudiced defendant’s case.” (Doc. 22, Ex. L at 2.) Thus,
20 Claim 1 was squarely addressed on the merits and is properly exhausted.
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22 The ruling regarding IAC on appeal, Claim 6, is less clear. Some of the confusion
23 is due to the terminology used to discuss the claim. As acknowledged by Higgins in the
24 PCR petition, his ineffective assistance of counsel (IAC) claims related to jurisdiction
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1 hinge on the question of “possession”; thus, those two words are used interchangeably by
2 him and the state courts to articulate the claim. Therefore, this Court looks at the PCR
3 court’s discussion of both jurisdiction and possession.
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5 The PCR court made the following finding: “Defendant’s argument that trial
6 counsel did not argue about whether the images were in his possession is simply factually
7 wrong; trial counsel did in fact argue the sufficiency of the evidence. So did appellant
8 counsel during the direct appeal.” (Doc. 22, Ex. L at 2.) A few pages later, the PCR court
9 discussed the question of jurisdiction more extensively: “As the State correctly argues:
10 ‘Admittedly, the Court of Appeals did not use the term “jurisdiction” while disposing of
11 this issue, yet the legal and factual analyses remains the same. Thus, the issue is
12 indistinguishable from the claim . . . that his possession was not intentional.’” (*Id.* at 4.)
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14 The PCR court went on to hold:
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16 Arizona had (and continues to have) jurisdiction to prosecute
17 defendant for the images found on the laptop computer, regardless of where
18 they were downloaded. The Court of Appeals must have determined that
19 Arizona had such jurisdiction; otherwise, the convictions and sentences
20 could not have been affirmed. The issue of jurisdiction is thus precluded
21 under Rule 32.2(a), as having been raisable on direct appeal and in fact
22 decided on direct appeal.

23 (*Id.*) The appellate court found no error in the PCR court’s decision. (*Id.*, Ex. N.)
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25 Arguably, the PCR court ruled on the merits of the claim when it stated that
26 appellate counsel raised the issue of possession on appeal. (Doc. 22, Ex. L at 2.) In
27 making that finding, the PCR court implicitly concluded the IAC on appeal claim was
28 without merit. Two pages later, the PCR court again indicated that appellate counsel

1 sufficiently raised jurisdiction, which undermines a claim of ineffectiveness. The PCR
2 court remarked that when appellate counsel raised (and the court of appeals decided) the
3 claim that Higgins did not intentionally possess the images that addressed the
4 jurisdictional argument. (*Id.* at 4.) Thus, this Court could conclude the PCR court
5 addressed this claim on the merits.
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8 Alternatively, the PCR court indicated that this issue was precluded because it was
9 raised and decided on appeal. There are two difficulties with this Court adopting such a
10 finding. First, the PCR court stated that the issue of jurisdiction was decided on appeal,
11 not that the IAC claims related to jurisdiction were resolved on appeal. This is logical
12 because it is not possible for appellate counsel to raise a claim of her own ineffectiveness
13 on appeal. Second, to the extent the PCR court's ruling was addressing the IAC claim, it
14 is evident that the ruling refers to Rule 32.2(a)(2), which addresses claims raised on
15 appeal. A preclusion ruling based on Arizona Rule 32.2(a)(2) does not operate as a bar to
16 federal review of a claim. *See Poland (Patrick) v. Stewart*, 169 F.3d 573, 578 (9th Cir.
17 1999) (noting that a precluded claim appears to be a "classic exhausted claim"); *Ceja v.*
18 *Stewart*, 97 F.3d 1246, 1253 (9th Cir.1996) (recognizing the distinction between waiver
19 and preclusion, and holding that "[p]reclusion does not provide a basis for federal courts
20 to apply a procedural bar"). Normally, when a state court makes a preclusion finding
21 under Rule 32.2(a)(2), a federal court reviews the claim by examining the earlier state
22 adjudication. In this instance, however, the IAC on appeal claim was not raised or
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1 decided on direct appeal. Consequently, this Court would have to find that the PCR court
2 erroneously determined that the issue had been resolved on appeal.

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4 Under either interpretation the claim is not procedurally barred from review in this
5 Court. Because Petitioner fairly presented Claim 6 in the PCR proceedings, and the state
6 courts did not find it defaulted pursuant to an adequate bar, it is properly before this
7 Court for review.

8 9 **LEGAL STANDARDS FOR RELIEF UNDER THE AEDPA**

10 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established
11 a “substantially higher threshold for habeas relief” with the “acknowledged purpose of
12 ‘reducing delays in the execution of state and federal criminal sentences.’” *Schriro v.*
13 *Landrigan*, 550 U.S. 465, 473-74 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202,
14 206 (2003)). The AEDPA’s “highly deferential standard for evaluating state-court
15 rulings’ . . . demands that state-court decisions be given the benefit of the doubt.”
16 *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*,
17 521 U.S. 320, 333 n. 7 (1997)).

18 Under the AEDPA, a petitioner is not entitled to habeas relief on any claim
19 “adjudicated on the merits” by the state court unless that adjudication:
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23 (1) resulted in a decision that was contrary to, or involved an
24 unreasonable application of, clearly established Federal law, as determined
25 by the Supreme Court of the United States; or

26 (2) resulted in a decision that was based on an unreasonable
27 determination of the facts in light of the evidence presented in the State
28 court proceeding.

1 28 U.S.C. § 2254(d). The last relevant state court decision is the last reasoned state
2 decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005)
3 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403
4 F.3d 657, 664 (9th Cir. 2005).
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6 “The threshold test under AEDPA is whether [the petitioner] seeks to apply a rule
7 of law that was clearly established at the time his state-court conviction became final.”
8 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under
9 subsection (d)(1), the Court must first identify the “clearly established Federal law,” if
10 any, that governs the sufficiency of the claims on habeas review. “Clearly established”
11 federal law consists of the holdings of the Supreme Court at the time the petitioner’s state
12 court conviction became final. *Williams*, 529 U.S. at 365; see *Carey v. Musladin*, 549
13 U.S. 70, 74 (2006).
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15 The Supreme Court has provided guidance in applying each prong of
16 § 2254(d)(1).
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18 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas
19 court may grant relief where a state court “identifies the correct governing legal rule from
20 [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . .
21 case” or “unreasonably extends a legal principle from [Supreme Court] precedent to a
22 new context where it should not apply or unreasonably refuses to extend the principle to a
23 new context where it should apply.” *Williams*, 529 U.S. at 407. For a federal court to find
24 a state court’s application of Supreme Court precedent “unreasonable,” the petitioner
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1 must show that the state court's decision was not merely incorrect or erroneous, but
2 "objectively unreasonable." *Id.* at 409; *Landrigan*, 550 U.S. at 473; *Visciotti*, 537 U.S. at
3 25. "A state court's determination that a claim lacks merit precludes federal habeas relief
4 so long as "'fairminded jurists could disagree' on the correctness of the state court's
5 decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v.*
6 *Alvarado*, 541 U.S. 652, 664 (2004)).
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8 ANALYSIS OF MERITS

9
10 The Court now analyzes the merits of Higgins's nine claims, eight of which allege
11 ineffective assistance of counsel by trial or appellate counsel.
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13 Ineffective Assistance of Counsel Standard

14 Ineffective assistance of counsel (IAC) claims are governed by *Strickland v.*
15 *Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner must show
16 that counsel's representation fell below an objective standard of reasonableness and that
17 the deficiency prejudiced the defense. *Id.* at 687-88.
18

19 The inquiry under *Strickland* is highly deferential, and "every effort [must] be
20 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
21 counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at
22 the time." *Id.* at 689. Thus, to satisfy *Strickland's* first prong, deficient performance, a
23 defendant must overcome "the presumption that, under the circumstances, the challenged
24 action might be considered sound trial strategy." *Id.*
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1 Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing court
2 “need not determine whether counsel’s performance was deficient before examining the
3 prejudice suffered by the defendant as a result of the alleged deficiencies.” *Id.* at 697 (“if
4 it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient
5 prejudice . . . that course should be followed”). A petitioner must affirmatively prove
6 prejudice. *Id.* at 693. To demonstrate prejudice, he “must show that there is a reasonable
7 probability that, but for counsel’s unprofessional errors, the result of the proceeding
8 would have been different. A reasonable probability is a probability sufficient to
9 undermine confidence in the outcome.” *Id.* at 694. Petitioner bears the burden of showing
10 the state court applied *Strickland* to the facts of his case in an objectively unreasonable
11 manner. *See Bell v. Cone*, 535 U.S. 685, 698-99 (2002).

16 **Claims 1 and 3**

17 In Claim 1, Higgins alleges trial counsel was ineffective for failing to contest the
18 exercise of jurisdiction over the counts in the indictment based on images found on his
19 laptop computer. In Claim 3, Higgins argues trial counsel was ineffective for failing to
20 argue that Higgins did not “possess” the images found on his laptop. These claims are
21 essentially synonymous as Higgins’s argument as to both is that receipt of the images
22 occurred in South Korea and the images were never accessed or even accessible in
23 Arizona because the laptop was infested with viruses, the keyboard was broken, and it
24 required forensic software to access the images.
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1 After the State rested during trial, defense counsel made an oral motion for
2 acquittal based on Arizona Rule of Criminal Procedure 20. (Doc. 22, Ex. V at 58.) He
3 argued there was no Arizona jurisdiction for receipt of the images and he disputed
4 “possession.” (*Id.* at 59.) He stated that there was no evidence that Higgins knew the
5 images were on his computer and it required special software to locate them. (*Id.* at 59-
6 60.) Finally, he argued that if Higgins ever possessed the photos the possession occurred
7 in Korea, where the photos were deleted in an effort to get rid of the images. (*Id.* at 61.)
8 After acknowledging counsel’s arguments, the trial court denied the Rule 20 motion. (*Id.*
9 at 80-81, 84-85.)

13 On appeal, counsel contested the sufficiency of the evidence to support the
14 charges based on the images on his laptop. (Doc. 22, Ex. D at 17-18.) The court of
15 appeals first stated that Higgins admitted to owning the laptop and the evidence
16 established that it had been used to access child pornography websites. (*Id.*, Ex. E at 6-7.)
17 The court further stated that the jury could have inferred that Higgins had accessed those
18 websites, thereby rejecting his testimony that he had not done so and was not aware the
19 images were on his computer. (*Id.* at 7.) Additionally, the jury could have inferred that
20 Higgins knew that images from websites he had visited were stored in hidden files on his
21 hard drive. (*Id.*) Based on the evidence and the current law, the court found that the jury
22 could have inferred that Higgins knowingly possessed the images on his laptop in 2007.
23 (*Id.* at 8.)

1 In ruling on the IAC claims, the PCR court found that Arizona had jurisdiction
2 over the claims and Higgins was not prejudiced by trial counsel not contesting
3 jurisdiction. (Doc. 22, Ex. L at 2.) The court further ruled that “Defendant’s argument
4 that trial counsel did not argue about whether the images were in his possession is simply
5 factually wrong; trial counsel did in fact argue the sufficiency of the evidence.” (*Id.*)
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8 It is evident that trial counsel raised the issue of jurisdiction and possession when
9 arguing for dismissal of these charges at trial. Because counsel raised this issue, he was
10 not deficient for failing to do so. Further, the court of appeals found there was sufficient
11 evidence to find that Higgins knowingly possessed the images in 2007, within the
12 jurisdiction of Arizona. Therefore, further argument on this point would not have been
13 meritorious and Higgins suffered no prejudice from counsel’s actions regarding this
14 issue. The state court’s denial of Claims 1 and 3 was not objectively unreasonable.
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17 **Claim 2**

18 Higgins argues trial counsel was ineffective for failing to investigate witnesses
19 that were stationed in South Korea with Higgins who could have testified that others had
20 access to his laptop computer on which the illegal images were found.
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22 With his PCR petition, Higgins submitted an affidavit in which he attested that he
23 provided trial counsel names of witnesses that could have testified that other people had
24 unlimited access to his laptop computer while he was stationed in South Korea. (Doc. 22,
25 Ex. K, Ex. 1.) The PCR court ruled that Higgins failed to indicate what testimony from
26 these witnesses could have aided his defense. (Doc. 22, Ex. L at 2.)
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1 Even if other people had access to Higgins's laptop, that would not have precluded
2 the jury from concluding that he was the person that downloaded the images found on his
3 computer. Regardless, Higgins was charged and the jury found him guilty of possession
4 of the images. Whether others had access to the laptop or even downloaded the material
5 is of limited relevance to the charge of possession in 2007.
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8 Thus, Higgins was not prejudiced by counsel's failure to investigate and present
9 evidence that others had access to Higgins's laptop. The state court's denial of this claim
10 was not objectively unreasonable.
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12 **Claim 4**

13 Higgins alleges trial counsel was ineffective for failing to request a recess or
14 continuance to discuss the prosecution's plea offer. Higgins contends that after two years
15 in jail he was mentally prepared for trial. However, he states that he would have accepted
16 the plea if counsel had advised him of the likelihood of success at trial.
17

18 In the week before trial, the prosecution offered Higgins a plea deal with a ten-
19 year sentence (to serve a minimum of 85% of the time) and lifetime probation. (Doc. 22,
20 Ex. Y at 137-38, 140.) At a pretrial motions hearing, counsel discussed the plea with the
21 court and the prosecutor stated that the deal was open only until the end of the day. (*Id.* at
22 138.)
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25 The trial court then held a *Donald* hearing. (*Id.* at 137, 140-45.) After going over
26 the possible sentence if Higgins were to lose on all counts (258 years, plus fines) and the
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1 terms of the plea deal, Higgins stated that he understood the possible sentence and the
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3 plea offer. (*Id.* at 141-44.) The Court then had the following colloquy with Higgins:

4 THE COURT: Do you have any questions you'd like to ask me or
5 your attorney or the prosecutor about the offer or about your potential
6 exposure if you go to trial and lose?

7 THE DEFENDANT: No, your Honor.

8 THE COURT: Do you believe that you've had a sufficient
9 opportunity to think about the matter and to talk to your attorney about
10 what's best for you?

11 THE DEFENDANT: Yes, I do.

12 THE COURT: And at this time what is your decision? Do you want
13 to accept the offer, or do you prefer to go to trial?

14 THE DEFENDANT: I am declining the offer, your Honor.

15 THE COURT: Okay. We will therefore proceed with trial.

16 (*Id.* at 144-45.)

17
18 Higgins attached an affidavit to his PCR petition in which he averred that counsel
19 failed to advise him on whether he should take the plea and that he would have accepted
20 the deal if given time to reflect. (Doc. 22, Ex. K, Ex. 1.) The PCR court recounted the
21 colloquy from the *Donald* hearing set forth above and held:
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23 The Court recalls that Mr. Higgins was very clear that he wanted to proceed
24 to trial. He did not waiver or hesitate in rejecting the offered plea.

25 There was no failing on the part of trial counsel in communicating
26 the 10-year offer to defendant. There is also no reason to believe that
27 defendant would ever have accepted that plea, no matter if more time had
28 been given. Although the court probably would have granted a request for a
recess to allow consideration of a plea, the court would not have continued

1 the trial under those circumstances. But the defendant's decision to go to
2 trial would not have been affected by any continuance.

3 (Doc. 22, Ex. L at 2-3.)

4 This claim cannot succeed because Higgins has failed to establish that counsel's
5 performance was deficient. First, seeking a continuance of trial would have been futile
6 because the plea deal was only available that day and the court stated it would not have
7 granted a continuance. Second, the PCR court's factual findings foreclose Higgins's
8 claim premised on counsel's failure to seek a recess. Despite Higgins's attestation to the
9 contrary, the PCR court found that counsel did not fail to adequately advise Higgins of
10 the plea and that Higgins would not have taken the plea given more time. These fact
11 findings are presumed correct and Higgins has presented no evidence to rebut that
12 presumption. 28 U.S.C. § 2254(e)(1). In light of the facts found by the PCR court,
13 Higgins cannot demonstrate that counsel's performance was deficient. The state court's
14 denial of this claim was not objectively unreasonable.

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19 **Claim 5**

20 Higgins argues that trial and appellate counsel were ineffective for failing to
21 dispute the jury instruction on indirect contact. Higgins argues there was no evidence that
22 he indirectly touched his daughter, therefore, the instruction should not have been given.

23
24 In discussing jury instructions, the trial court proposed the following instruction,
25 to which defense counsel did not object:

26 The crime of molestation of a child requires proof of the following:
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1. The defendant intentionally or knowingly engaged in any direct or indirect manipulation of Taylor Higgins' vulva with his finger, and
2. The child was under 15 years of age.

(Doc. 22, Ex. W at 108.) The instruction was given as agreed. (*Id.* at 150.) During deliberations, the jury sent out a note, which said "please define 'indirect manipulation.'" (Doc. 22, Ex. X at 2.) Defense counsel proposed a response, which was rejected by the trial court in favor of the prosecution's proposal: "[i]ndirect manipulation means manipulation other than by direct touching." (*Id.* at 6-10.) Defense counsel went on to argue unsuccessfully that the term "indirect manipulation" was unconstitutionally vague and, therefore, Count 2 should be dismissed. (*Id.* at 10.)

On direct appeal, counsel challenged the sufficiency of the evidence to support the molestation conviction. The appellate court held that, in addition to the portion of the video seen by Higgins's girlfriend, Higgins tacitly admitted to touching his daughter during a phone call with his girlfriend by stating various things including that he had not touched anyone else's children.

Appellate counsel also argued that the supplemental jury instruction on indirect manipulation was not supported by the evidence and allowed the jury to convict based on speculation. (Doc. 22, Ex. D at 19-20.) Additionally, she argued the supplemental instruction was unconstitutionally vague. (*Id.* at 20.) The appellate court agreed that there was no evidence of an indirect touching. (Doc. 22, Ex. E at 9.) The court noted that the jury was instructed that some instructions might be inapplicable. (*Id.*) The court of

1 appeals concluded the response to the jury's question was not an incorrect statement of
2 the law and did not amount to reversible error. (*Id.*)

3
4 In ruling on Claim 5, the PCR court relied on the findings by the appellate court
5 on the related claim regarding the supplemental jury instruction: the issue of "indirect
6 touching" was immaterial because there was no evidence the defendant had touched the
7 victim with an object or through her clothing; the jury was instructed that some
8 instructions would not apply; and the supplemental instruction was correct. (Doc. 22, Ex.
9 L at 3.) Therefore, the PCR court concluded that Higgins was not prejudiced by counsel's
10 failure to challenge the instruction at trial or on appeal. (*Id.*)

11
12 The instruction as given was not erroneous as it tracked the statutory language and
13 the language of the indictment. The indictment charged Higgins in Count 2 with
14 molesting his daughter "by intentionally or knowingly engaging in or causing a person to
15 engage in sexual contact, to wit manipulated . . . vulva with his finger." (Doc. 22, Ex. A
16 at 1.) Molestation of a child occurs by a person "intentionally or knowingly engaging in
17 or causing a person to engage in sexual contact . . . with a child who is under fifteen years
18 of age." A.R.S. § 13-1410(A). "Sexual contact" is defined as "any direct or indirect
19 touching, fondling or manipulating of any part of the genitals, anus or female breast by
20 any part of the body or by any object or causing a person to engage in such contact."
21 A.R.S. § 13-1401(2). The trial court's instruction tracked the statute with some elements
22 removed because they were not alleged in the indictment or relevant to the evidence
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1 presented, such as touching and fondling, or causing someone else to engage in contact.
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3 (See Doc. 22, Ex. W at 102-03, 107.)

4 Higgins has failed to explain how this accurate jury instruction prejudiced him.
5 There is no evidence of harm by the inclusion of indirect manipulation simply because
6 there may not have been evidence to convict him on that ground. Critically, the court of
7 appeals found there was sufficient evidence to support his conviction under the statute
8 based on a direct manipulation. The state court's denial of this claim was not objectively
9 unreasonable.
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11 **Claim 6**

12 Higgins argues appellate counsel was ineffective for failing to argue the lack of
13 jurisdiction in light of the fact that Higgins had no "possession" of the images while in
14 Arizona.
15

16 Although appellate counsel did not frame a claim in terms of jurisdiction, she did
17 argue about the issue of possession during the time-frame alleged in the indictment. She
18 argued there was insufficient evidence to establish that Higgins knowingly possessed
19 child pornography because there was no evidence he had the knowledge to access deleted
20 hidden images in 2007, particularly in light of the evidence that the laptop was broken
21 and had no power cord. (Doc. 22, Ex. D at 17-18.) The court of appeals denied the claim
22 finding there was sufficient evidence from which the jury could infer that Higgins knew
23 the images were on his laptop during the 2007 time-frame alleged in the indictment.
24
25 (Doc. 22, Ex. E at 8.)
26
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1 Because the appellate court found there was sufficient evidence to sustain
2 Higgins's convictions for possession of child pornography in 2007, a jurisdictional claim
3 premised on the same argument would have failed. Therefore, appellate counsel was not
4 deficient for failing to argue a meritless claim and Higgins was not prejudiced by her
5 failure to raise it.
6

7
8 **Claim 7**

9 Higgins argues appellate counsel was ineffective for failing to argue that his
10 sentences violated the Eighth Amendment. Higgins contends his sentences totaling 175
11 years should have been challenged on severity in light of the fact that the images were
12 "not catalogued nor located within any particular space or file on the hard drive, not
13 accessed, modified, or viewed since 2005, and not downloaded by petitioner." (Doc. 1-2
14 at 42.) Further, Higgins's expert testified that many of the images were likely the result of
15 a virus.
16

17
18 The PCR court ruled that an Eighth Amendment argument was futile in light of
19 *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006). (Doc. 22, Ex. L at 4.) Therefore,
20 counsel's performance was not deficient and, because the appellate court would have
21 denied such an argument, Higgins was not prejudiced. (*Id.*)
22

23 In *Berger*, the defendant was convicted on twenty counts of sexual exploitation of
24 a minor related to child pornography and sentenced to ten years per count, each to be
25 served consecutively. 134 P.3d at 380, 212 Ariz. at 475. The Arizona Supreme Court
26 stated that generally an Eighth Amendment analysis looks at the sentence for each crime
27
28

1 not the fact that they were imposed consecutively or that the aggregate sentence is
2 lengthy. *Id.* at 384, 212 Ariz. at 479. The court ultimately held that a ten-year sentence is
3 not grossly disproportionate to knowingly possessing child pornography. *Id.* at 384, 212
4 Ariz. at 479.

5
6 Here, Higgins was convicted under the same statute as Berger, A.R.S. § 13-3553,
7 and the judge sentenced him to a partly mitigated sentence of 12.5 years on each of 14
8 counts. (Doc. 22, Ex. B at 3, 9-22.) The Arizona Court of Appeals has held that it is
9 bound to follow *Berger* and could not grant relief on an Eighth Amendment claim
10 involving seven consecutive 10-year sentences for possession of child pornography. *See*
11 *State v. McPherson*, 269 P.3d 1181, 1186, 228 Ariz. 557, 562 (Ct. App. 2012). Because
12 the appellate court would have denied an Eighth Amendment claim by Higgins in light of
13 *Berger*, his counsel was not deficient for failing to raise the claim and Higgins was not
14 prejudiced by the failure. *See Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985)
15 (“Failure to raise a meritless argument does not constitute ineffective assistance”). The
16 state court’s denial of this claim was not objectively unreasonable.

21 **Claim 8**

22 Higgins argues trial and appellate counsel were ineffective for failing to challenge
23 Counts 2, 3, and 4 as multiplicitous in violation of the Double Jeopardy Clause. Higgins
24 contends he received multiple sentences for a single offense, which was a continuous act
25 involving one victim. Count 2 was child molestation, and Counts 3 and 4 were sexual
26 exploitation of a minor.
27
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1 The PCR court did not provide a substantive ruling on this claim, however, the
2 court of appeals addressed it. The appellate court held that because there was no double
3 jeopardy offense counsel was not deficient for failing to raise the claim and Higgins was
4 not prejudiced.
5

6 The double jeopardy clause protects against multiple punishments for the same
7 offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). “Often a course of criminal conduct
8 will entail the violation of several statutes. In those cases, if the statutes are not
9 redundant, the prosecutor may charge the defendant with violating one or all of the
10 statutes, and the defendant can be convicted of violating more than one statute.” *United*
11 *States v. Duncan*, 693 F.2d 971, 975 (9th Cir. 1982). “The applicable rule is that, where
12 the same act or transaction constitutes a violation of two distinct statutory provisions, the
13 test to be applied to determine whether there are two offenses or only one, is whether
14 each provision requires proof of a fact which the other does not.” *Blockburger v. United*
15 *States*, 284 U.S. 299, 304 (1932). If each statute requires proof of an additional fact the
16 charges are not multiplicitous. *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871).
17

18 To gauge potential redundancy, the Court must look at the elements of each
19 statute. This Court relies upon the analysis conducted by the court of appeals, which set
20 forth the distinct elements of each statute:
21

22 In this case, Higgins’s two convictions for sexual exploitation of his
23 daughter were based on one violation of A.R.S. § 13-3553(A)(1), which
24 prohibits “[r]ecording, filming, photographing, developing or duplicating
25 any visual depiction in which a minor is engaged in exploitive exhibition or
26 other sexual conduct,” and one violation of § 13-3553(A)(2), which
27 prohibits “[d]istributing, transporting, exhibiting, receiving, selling,
28

1 purchasing, electronically transmitting, possessing or exchanging” such
2 visual depictions. . . . As we explained in *State v. Paredes-Solano*, 223
3 Ariz. 284, ¶¶ 15-16, 222 P.3d 900, 906 (App. 2009),

4 The actions listed in [Section 13-3553,] subsection
5 (A)(1) cause harm to the child in the creation of the visual
6 images, while the acts in subsection (A)(2) harm the child
7 through the perpetuation of those images. Each subsection is
8 violated by distinctly different conduct causing different
9 kinds of harm to the child. The two subsections thus represent
10 more than merely different ways of committing a single
11 offense and, we conclude, create offenses that are separate
12 and distinct.

13 Similarly, Higgins’s molestation conviction required proof of
14 entirely different conduct, specifically that he “intentionally or knowingly
15 engag[ed] in . . . sexual contact . . . with a child under fifteen years of age.”
16 1993 Ariz. Sess. Laws, ch. 255, § 29.

17 (Doc. 22, Ex. N at 5.)

18 As explained above, each of the three counts required distinct conduct that the
19 other counts did not. Count 2 required sexual contact, which Counts 3 and 4 did not.
20 Count 3 required the creation or duplication of a visual depiction, which Counts 2 and 4
21 did not. And, Count 4 required possession of a visual depiction, which Counts 2 and 3 did
22 not. Thus, there was no violation of double jeopardy and counsel was not ineffective for
23 failing to raise this claim. The state court’s denial of this claim was not objectively
24 unreasonable.

25 **Claim 9**

26 Higgins argues the PCR improperly denied him an evidentiary hearing on his PCR
27 petition. Petitioner can only raise claims in his federal habeas petition based on a
28 violation of the United States Constitution or federal law. 28 U.S.C. § 2254(a). Claim 9

1 does not assert a federal law violation, therefore, it is not cognizable before this Court.
2
3 Further, alleged errors in the PCR process are not cognizable in a federal habeas corpus
4 proceeding because they do not attack the lawfulness of Petitioner's detention. *See*
5 *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam) (finding allegations of
6 error in state post-conviction review process non-cognizable); *Gerlaugh v. Stewart*, 129
7 F.3d 1027, 1045 (9th Cir. 1997). Claim 9 is not cognizable.
8

9
10 **CERTIFICATE OF APPEALABILITY**

11 Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court
12 must issue or deny a certificate of appealability (COA) at the time it issues a final order
13 adverse to the applicant. A COA may issue only when the petitioner has made a
14 substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This
15 showing can be established by demonstrating that reasonable jurists could debate whether
16 (or, for that matter, agree that) the petition should have been resolved in a different
17 manner or that the issues were adequate to deserve encouragement to proceed further.
18 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880,
19 893 & n.4 (1983)). The Court finds that reasonable jurists could not debate that the merits
20 of any claim should have been resolved differently. Therefore, a COA will not issue.
21
22


23 Accordingly,

24
25 **IT IS ORDERED** that the Petition for Writ of Habeas Corpus is **DISMISSED**.

26 **IT IS FURTHER ORDERED** that the Clerk of Court should enter judgment and
27 close this case.
28

1 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
2
3 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
4 certificate of appealability.

5 Dated this 15th day of September, 2014.

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11 D. Thomas Ferraro
12 United States Magistrate Judge
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